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QUESTION PRESENTED

Whether the Court of Appeals correctly concluded that a New York City park regulation mandating the use of a city designated sound system and sound engineer violated the First and Fourteenth Amendments because the city failed to show that these requirements were "justified without reference to the content of regulated speech, that they are narrowly tailored to serve a substantial governmental interest and that they leave open ample alternative channels for communication." *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984).

PARTIES BELOW

The parties in this case are as follows:

A. Respondent

1. Rock Against Racism.

B. Petitioners

1. Benjamin R. Ward, in his official capacity as Police Commissioner of the City of New York;
2. George Scarpelli, in his official capacity as Chief of Operations for the Department of Parks of the City of New York;
3. Sheldon Horowitz, in his official capacity as Special Events Director of the said Department of Parks;
4. Robert Russo, in his official capacity as Assistant Commissioner for City-Wide Services for the said Department of Parks;
5. Joseph Killian, in his official capacity as Program Director for the Mall Bandshell of the Bethesda Terrace area of Central Park in New York City, said Department of Parks;
6. Edward I. Koch, in his official capacity as Mayor of the City of New York; and
7. The City of New York.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-226

BENJAMIN WARD, et al.,

Petitioners,

—against—

ROCK AGAINST RACISM,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT

STATEMENT OF THE CASE

Respondent Rock Against Racism (hereinafter referred to as "RAR") is an unincorporated association "dedicated to the espousal and promotion of anti-racist views." Ct. Ap. Op. 3.[1]

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1 The following abbreviations will be used in this brief: "JA _____" for citation to the Joint Appendix, "Ct. App. Op. _____" for citation to the opinion of the United States Court of Appeals for the Second Circuit (located in the Appendix to the Petition for a Writ of Certiorari); "Dist. Ct. Op. I _____" for citation to the opinion of the United States District Court for the Southern District of New York, dated April 6, 1987 (which is located in the Appendix to the Petition); "Dist. Ct. Op. II _____" for citation to the opinion of the United States District Court for the Southern District Court of New York, dated April

Since 1979, RAR has sponsored an annual rally/concert at the Naumberg Bandshell (hereinafter referred to as "the Bandshell") in Central Park in the City of New York, featuring speeches by representatives of groups opposed to racism in the United States, interspersed with musical groups representing various nationalities and cultures.[2]

RAR commenced the instant litigation in April 1985, after its request to use the Bandshell for its 1985 rally/concert was denied. Less than a week later, at the suggestion of the district court, the parties reached a settlement and RAR was issued a permit for use of the Bandshell. Following further proceedings the case was placed on the reserve calendar.

A few weeks prior to RAR's 1986 rally/concert, the New York City Department of Parks issued "Use Guidelines," (hereinafter referred to as "the Guidelines") governing the granting of permits for and the staging of events at the Bandshell. The Guidelines set forth Department of Parks' policies on twelve subjects: (1) Permits; (2) Hours/Dates of use; (3) Attendance; (4) Sound Amplification; (5) Insurance; (6) Vehicles; (7) Concession of Goods; (8) Revenue; (9) Safety; (10) Portable Toilets; (11) Cleanup; and (12) Evaluation. The Sound Amplification Guideline, (hereinafter referred to as "SAG"), the provision at issue herein provides, in relevant part that:

30, 1987 (which is located in the Appendix to the Petition); "T.T." for citations to the trial transcript; "Pet. Br." for citation for the Brief for Petitioners; "U.S. Br." citation to the Brief for the United States as Amicus Curiae Supporting Petitioners.

2 Almost every year since it began sponsoring an annual rally/concert at the Bandshell, RAR has experienced difficulty in either obtaining a permit for the Bandshell in completing the events without interference from Park officials and/or the police. In 1983, for example, during the performance of a band, one of whose names expressed antipathy towards police, several police officers approached RAR's sound technician, Alan Thompson, surrounded him and asked which knob controlled the master volume. After Mr. Thompson identified the appropriate knob, one of the officers turned the knob down in a jarring fashion. JA 105. In 1985, two police officers were overheard by Mr. Thompson ridiculing a Native American folk singer. JA 106.

> DEPARTMENT OF PARKS AND RECREATION IS TO BE THE SOLE AND ONLY PROVIDER OF SOUND AMPLIFICATION INCLUDING THOUGH NOT LIMITED TO AMPLIFIERS, SPEAKERS, MONITORS, MICROPHONES, AND PROCESSORS
>
> Department of parks and recreation will employ a professional sound technician [who] will be fully versed in sound bounce patterns, daily air currents, and sounds skipping within the park.

JA 375.

The relevant proceedings and decisions below were as follows:

1. The District Court's Decision of May 1, 1986

On April 23, 1986, RAR filed an application for an order to show cause why the Guidelines should not be held to be violative of the First and Fourteenth Amendments. The district court, on the basis of opposing affidavits submitted by the parties and "such testimony as time pressure allowed," upheld the Guidelines' requirements of a licensing fee, clean-up bond, and liability insurance, but concluded that the provisions requiring that the department be "the sole and only provider of sound amplification" and the city's attempt to limit RAR's time at the Bandshell were unlawful. JA 78. In preliminarily enjoining enforcement of the Sound Amplification Guideline, the court stated:

> This guideline would require RAR to abandon its own system, which it used without complaint by the City last year, and use different equipment whose knobs and dials would be twisted by the hands of strangers—in point of fact, private contractors hired by the City but paid for by RAR. It is recognized that "live musical expression is protected by the First Amendment." *Cinevision Corp. v. City of Burbank*, 745 F.2d 560, 569 (9th Cir. 1984). I agree with RAR that, absent a significant governmental interest requiring a different result, that protection extends not only to the

> words and songs presented but also the sound with actually emanates from the application system. That sound may be substantially affected by the amplification itself and who controls it. To paraphrase the old song; "The music goes round and round, but it comes out *here*."

JA 79-80.

The court also found that the defendants had "failed to demonstrate a constitutionally sufficient basis for the cutting off of the RAR event at 6:00 p.m. because "the guidelines permit 'evening performances to' run until 9:30 p.m." JA 83.[3]

2. The District Court's Decisions of April 16 and April 30, 1987

On November 5, 1986, RAR filed an Amended Complaint seeking a declaration that the Guidelines were unconstitutional and requesting compensatory and punitive damages. The defendants filed an answer, and, discovery proceeded. The trial commenced on March 23, 1987, and ended on April 1, 1987. Twelve witnesses testified at trial.

The first two, Dean Tuckerman and Christy Robb, testified to the difficult history of RAR and the Parks Department. Tuckerman testified that RAR had been refused other locations in Central Park in 1980 such as the Great Lawn, because the Parks Department of the City of New York stated that no "rock" music was allowed there, and offered the Bandshell. T.T. 9-10.

The second witness to testify for RAR was Christy Robb. Ms. Robb testified to the extensive meetings RAR was required to have with the Parks Department and other city agencies, in order to obtain the necessary permits. T.T. 21-22. In 1983, Ms. Robb testified the Park's Department wanted to know the content of the show because it was scheduled to take place on

3 The City's appeal of the District Court's May 1, 1986 decision was dismissed as moot by the Court of Appeals because RAR's rally/concert had already occurred.

Mother's Day. The necessary permits for the 1983 concert were obtained two days before the event. T.T. 22-23.

Additionally, Ms. Robb testified that in 1983 the police surrounded the mixing board and constantly complained to the sound mixer about the volume of the show, although no meters were utilized to determine the decibel level. T.T. 25. At the same concert the police manipulated the dials and controls of the sound mixing board and "pulled the plug" before RAR's permit expired. T.T. 25-26. Ms. Robb stated that when RAR hooked up its own electrical generator, the police physically attacked the generator to stop the flow of power to the musicians. T.T. 26.

Ms. Robb further testified that in 1985 RAR had actually been refused a special events permit for allegedly violating a decibel level requirement during the previous year's event. T.T. 30. After lengthy delays and meetings, RAR was finally able to obtain the necessary permits. T.T. 32-35.

Ms. Robb also testified as to the 1986 RAR rally/concert. According to Ms. Robb, although RAR had put in their application for the event immediately after the 1985 rally, it never heard from the Park's Department. Ms. Robb contacted the Parks Department in January 1986. T.T. 40-41. Ms. Robb was told that that the choice of performers was to be left to the discretion of Mr. Killian, the newly appointed program director for the Naumburg Bandshell T.T. 43-44. After Ms. Robb received the Use Guidelines for the Bandshell, she concluded that they were more stringent then those previously enforced, and it was for that reason RAR went back into court to enjoin the Use Guidelines. T.T. 45-47.

The parties reached a temporary resolution, and RAR went forward with its event. T.T. 49. The many problems with the City, however, effected RAR's ability to attract performers because many of the them were hesitant to play for a group enmeshed in so many problems. T.T. 51-52. In 1986, RAR was not required to use the city's sound system.

Extensive testimony was also given by Alan Thompson, RAR's "mixer". Thompson testified that he had worked with RAR since 1980, and had engineered over 200 concerts for RAR, including the 1985 and 1986 rally/concerts at the Bandshell. T.T. 72-73; 77. Mr. Thompson testified that engineering the sound means setting up all the individual instruments, and then having all of the instruments plugged into the sound, or mixing board. T.T. 72-73. Mr. Thompson continued:

Q. Wait a minute. Lets take it a step at a time here. What is a mixing desk.

A. A mixing desk is a console that combines multiple signals into one signal which is then fed into a sound system.

Q. Can you describe to me what that means in real terms?

A. If a band is set up you can either put one microphone on the entire band or you can put individual microphones on the individual instruments and mix them into one signal and feed it into a sound system.

Q. You're at this board, is that correct?

A. Yes I am at the board, and basically during the performance I am a part of the band, because I am balancing all of their instruments together to sound right to their taste. . . .

* * *

Q. What is echo and reverb?

A. Effects. Like they will want certain effects at certain times and they will give me a list of songs and at each song they will say what type of sound they want for each song, or they will just station one of their own people with me, which is more common.

The Court: At a particular time in a performance can the sound mixer, for example build up one particular instrument and relatively play down others?

A. Exactly. When the guitarist is about to take a lead, for instance, there will be a slight boost just to improve the dynamics, so you can hear the guitar clearly over the rest, yes. Sometimes it is accomplished by turning the rest down so that it doesn't overpower the audience and sometimes it is accomplished by simply boosting one signal.

Q. On the soundboard, if you can approximate how many different individual variations are there for a song?

A. Well, I have somewhere between 200 and 300 separate adjustments that can be made, and during the course of a song my hands will moving all over the board continually, constantly making adjustments. I can't really tell you—estimate how many adjustments I make, but there are quite a few knobs to turn.

T.T. 74-75.

Additionally, Mr. Thompson testified to the sound engineer's role in the overall production of music.

Q. Does the manipulation of the dials require any type of artistic understanding?

A. Absolutely. For instance when you have a concert where there is several different types of music available one has to have a very deep understanding of what a reggae audience or a reggae band would want other than a folk type band. In other words in a reggae type of thing the high hat is supposed to be louder than in any other type of band and the bass guitar is supposed to be very dominant and very boomy and when you go to the next band they want a completely different setup.

T.T. 76-77.

Thompson also stated that there had been incidents with the police since 1981. He stated that in 1984 the police came up to the soundboard and physically turned the volume down.

T.T. 80. As a result, the entire crowd "whirled around", and shouted and complained. T.T. 80. In 1985, the police threatened Thompson that if he did not turn the volume down, they would pull the plug. T.T. 84-85.

In addition, Thompson related that he thoroughly interviews the bands before each performance to determine their needs. T.T. 99. The main basis upon which RAR attracts performers is through the assurance that RAR is in complete control of the set-up and mix. T.T. 102. The performers would not appear otherwise. *Id.* RAR uses a limiter or compressor on its sound system that is designed to automatically limit the sound. T.T. 121.

Defendant Sheldon Horowitz, the Special Events Director of the Department of Parks admitted that he did not receive any complaints in 1985 about the RAR event. T.T. 263.

Gary Floyd, the city's sound expert, stated on cross-examination, that the most important factor in the accurate and aesthetic reproduction of amplified music is the individual working the sound board or mixing board. T.T. 386. Mr. Floyd testified that this person is in charge of the aesthetics of the entire sound. T.T. 398-309. He also stated that the more time a mixer, or soundboard operator, spents with a band the better her/his understanding of the sound of a band. T.T. 390. Additionally, Floyd observed that, although it is not customary, bands can and do ask for particular and unusual sound requirements. T.T. 412-413.

Defendant Joseph Killian testified that the goal of the SAG was to keep the sound within the concert grounds so that it does not bleed into the Sheep Meadow. Killian asserted that it was important to keep the sound from the Bandshell away from the Sheep Meadow because the Sheep Meadow had been decreed a "quiet zone" by New York City Mayor Edward I. Koch. JA 192-194. Killian conceded that it was rare, if ever, that a good show could be produced by a technician unfamiliar with the equipment being used.

According to Killian approximately 45 minutes is needed to have a sound check to satisfy the needs of the all of the bands as far as mixing is concerned. JA 242. This means that at the RAR rally/concert which has approximately six bands, each band has about 7.5 minutes to do a sound-check with New York Sound. (The sound company selected by the City).

Following the trial, the court enjoined enforcement of certain provisions of the Guidelines and sustained two.[4] One of the two

---

4 The Guidelines' requirement of a "user fee" for the city-provided sound system "of $100 per performance hour plus a one hour check" was held violative of the First Amendment because "[t]he evidence shows that, under its contract with New York Sound System the city is billed $400.00 for each New York Sound event service at the Bandshell, regardless of duration, and Second Circuit cases prohibited the city from recouping from First Amendment users an amount in excess of the costs actually incurred by the city. A six hour RAR event, when coupled with a one hour sound check would result in a charge of $700.00; almost twice the cost incurred by the city under its contract with the New York Sound." Dist. Ct. Op. II 55.

The court held the liability provision unconstitutional because "it impermissibly vests unfettered discretion in Parks administrators responsible for issuing special event permits" and petitioners have failed to show "that it. . . . [was] narrowly tailored to further legitimate state interests." Dist. Ct. Op. II 58. The Guidelines' provisions setting separate time limits for different performing acts/events was sustained, in part and struck down in part. The court upheld the provision permitting amplified sound at the Bandshell only from 2:00 a.m. to 9:30, but struck down the section according different treatment to performances on the basis of their categorization as performing arts, multiple performance, or festival because the categorizations were vague and undefined and "so shot through with unfettered grants of discretion to city administrators." Dist. Ct. Op. II 71. The provisions of the Guidelines limiting attendance at events at the Bandshell to 3,000 people and barring solicitation of funds and revenue anywhere within Central Park was struck down. The former because the city failed to establish that it was "narrowly tailored to meet the legitimate interest in keeping the park accessible to other park users," the latter because the city failed to identify any legitimate interest underlying this prohibition. . . ." Dist. Ct. Op. II 72, 75.

The proceeding fee and clean-up bond were upheld because, unlike the "user fee" for the sound system, both were costs that could have accrued to the city and RAR had not proven indigence. Additionally,

sections of the Guidelines that was upheld by the district court was the SAG. In upholding the sound amplification provision, the court acknowledged that "RAR has a First Amendment right to the use of a sound amplification system capable of producing the quality of sound it decides, and the level of sound necessary to reach throughout the audience area." Dist. Ct. Op. I 46. However, the court held that "RAR's interest in using its own equipment and sound engineer is . . . 'attenuated' at best. . . ." *Id.* It then went on to conclude that the SAG's requirements were constitutional "because they do not impinge upon a protected right." In dictum, the court observed that "[E]ven if some slight interest in using familiar equipment exists, the guidelines are narrowly tailored to further a legitimate governmental interest." Dist. Ct. Op. 48.[5]

3. The Court of Appeals Decision

The Court of Appeals, in a unanimous decision, reversed the district court holding that the Sound Amplification Guideline was constitutional. Writing for the court, Judge Dorsey first set forth the standard to be applied:

> There is no dispute but that the bandshell, a place traditionally 'used for the purposes of assembly, communicating thoughts between citizens, and discussing public questions,' is a public forum. As such, the city's regulation of the bandshell's use is subject to the first amendment's

---

the court upheld that the provision requiring that permits be obtained for vehicles because it was necessary to control entrance and egress from the park and enabled city officials to trace vehicles in the event of claims or violations. Dist. Ct. Op. 57, 58.

5 Both parties thereafter filed motions pursuant to Rule 59(e) of the Federal Rules of Civil Procedure to alter or amend the April 16th order. JA 457-491. The court granted defendants' motion to delate from its April 16th order the paragraph enjoining enforcement of the provision prohibiting solicitation of funds and revenue because RAR had not included this provision in its proposed conclusions of law. Dist. Ct. Op. II 86, 87. RAR's cross motion for an order clarifying whether it had the right to control the sound system "mix" was denied. *Id.* at 87-88.

> limitations on government action which infringes upon the freedom of expression. 'In such places, the government's ability to permissibly restrict expressive conduct is very limited. This protection extends to the production and transmission of musical performances as well as speech.
>
> Under certain circumstances, the city has the right to regulate expressive conduct which has harmful effects on others. Content neutral time, place and manner regulations are permissible so long as they are narrowly tailored to serve a substantial government interest and do not unreasonably limit alternative avenues of expression.

Ct. App. Op. 10-12. (citations omitted). Judge Dorsey added, "However, the method and extent of such regulation must be reasonable, that is it must be the least intrusive upon the freedom of expression as is reasonably necessary to achieve a legitimate purpose of the regulation." *Id.* (citations omitted).

The Court of Appeals found that "The city's express purpose" was "to prevent the noise generated at the bandshell from intruding offensively upon those who choose to attend or hear the musical presentation." Ct. App. Op. 12. It rejected the district court's findings that the city had a second objective in enacting the SAG of ensuring quality of sound at the bandshell:

> [T]he court justified its conclusion that the SAG was valid with reference only to the city's no control objective. No determination was made of the weight to be given the city's interest in quality control, nor was there a finding that this objective could not be effected by other less restrictive means.

Ct. App. Op. 13, n3. Thus, to satisfy its burden, the Court of Appeals, concluded that the city was required to "demonstrate that is regulation of the volume its reasonably accomplished by the required use of the city's system and the city's operator and that the requirements do not unnecessarily intrude on the right of artistic expression." Ct. App. Op. 16. The court concluded that the city had failed to meet its burden because:

> [R]estriction to the use of the city's sound systems is not shown to be necessary to control noise levels. Any system has a volume control. The quality of the system has a limited relation to the regulation of volume. Nor has the technician's operating knowledge been shown to be essential to the regulation of volume. Indeed, another city official monitors the noise level and instructs the technician as necessary to the broadcast volume within the permitted levels.

Ct. App. Op. 17-18.

"[W]ithout ruling on . . . . [their] constitutionality, "the court then discussed alternatives available to the city. Those alternatives included the city's use of a volume limiting device, and negotiating an appropriate decibel level. *Id.* at 18-19.

Thus, the Court of Appeals affirmed the district court's decision to the extent that it sustained the right of the city to limit the volume of performances broadcast from the bandshell to a level otherwise specified. The upholding of the SAG's requirement of the use of city-provided sound system, operated by an engineer supplied by the city, was reversed.

SUMMARY OF ARGUMENT

Petitioners' presentation of their case to this Court is remarkable for its obfuscations. This case is not about the regulation of "noise," but rather petitioners' attempt to control "artistic expression." As a result of petitioners' Sound Amplication Guideline, musicians and concert promoters who hold concerts at the Central Park Bandshell are confined to the use of a city supplied sound system and a city-designated engineer. Local authorities should no more be permitted to tell musicians or concert promoters what kind of sound system they can use or who can operate it than they should be permitted to instruct painters what colors to use or authors what words to write.

Additionally, Petitioners' Brief barely acknowledges that the Bandshell is a "quintessential public forum." Nor do petitioners' recognize that "[c]oncerts . . . have been an integral part"

of the activities at the Bandshell "since the original bandshell was built in 1862." JA 372. By virtually ignoring these matters, petitioners have beclouded what this case is about.

In Part I of this brief, respondent will demonstrate that the Court of Appeals decision should be affirmed because the SAG impermissibly infringes on freedom of expression and because petitioners failed to establish that the SAG was "justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a substantial governmental interest, and that they leave open ample alternative channels for communication." *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984). In Part II, respondent will show that the Court of Appeals decision is consistent with the prior applicable decisions of this Court.

ARGUMENT

I.

THE COURT OF APPEALS CORRECTLY CONCLUDED THAT THE SAG VIOLATED THE FIRST AMENDMENT BECAUSE IT IMPERMISSIBLY INFRINGES ON RESPONDENT'S RIGHT TO FREEDOM OF EXPRESSION, IS NOT NARROWLY TAILORED TO SERVE A SUBSTANTIAL GOVERNMENTAL INTEREST AND DOES NOT LEAVE OPEN AMPLE ALTERNATIVE AVENUES OF COMMUNICATION

Ignoring the issues involved herein,[6] Petitioners persistently characterize their regulations as controls on sound or noise.

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6 In *Speiser v. Randall*, 357 U.S. 513 (1958), this Court recognized that in dealing with First Amendment regulations courts must closely examine both the "operation and effect" of such regulations:

> When we deal with the complex strands in the web of freedoms which make up the free speech, the operation and effect of the method by which speech is sought to be restrained must be subjected to close analysis and critical judgment in the light of the particular circumstances to which it is applied.

Id. at 520.

However, as the Court of Appeals correctly recognized, the SAG's effects extend far beyond either of these:

> Under the SAG *all* sponsors of events at the bandshell must use a sound system and sound engineer supplied by the city, and no other. The city contracts a private firm which supplies a sound system and technician approved by the city for each event. *Thus, the volume, the sound 'mix' and the overall sound quality are all under the physical control of the city supplied technician who answers to officials of the Department of Parks. During the musical program, this sound engineer presides at a 'mixing board' which controls inputs (sound levels, bass, treble, etc.) from each instrument, performer or microphone. By varying the sound mix, the sound engineer can control what the audience hears over the speaker system, including both the volume and artistic result or sound quality.*

Ct. App. Op. 5. (emphasis supplied).[7]

Protection of musicians' and concert promoters' right to "artistic expression" would be meaningless if it did not include the right to use their own sound system and sound engineer because of the crucial role of "mixing" in musical productions.[8] *See e.g.* R. Buskin, "Engineering: Chinese Instruments,

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7 In essence, the SAG is analogous to (a) requiring the publisher of a newspaper to have a governmental agent control its presses to stop undesirable material from being printed or (b) mandating the owner of a radio station to have a state operator reduce or eliminate its signal for the same reason.

8 This Court has held that the First Amendment protects musicians, as well as other artists, right to freedom of expression:

> Entertainment, as well as political and ideological speech, is protected; motion pictures, programs broadcast by radio and television, and live entertainment, such as musical and dramatic works, fall within the First Amendment guarantee.

Shad v. Borough of Mount Ephraim, 452 U.S. 61, 65 (1981). *See also, Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975); *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495 (1952); *Fact Concerts Inc. v. City of Newport*, 626 F. 2d 1060 (1st Cir. 1980), *rev'd on other grounds*, 453 U.S. 247 (1981) petitioners have not claimed, nor can they claim, that the music sought to be performed by Respondent's is without artistic value. *Miller v. California*, 413 U.S. 15, 22 (1973). Nor can petitioners argue that the music respondent seeks to reform is physically, emotionally or otherwise harmful to those whose hear it. *See, Cox v. Louisiana*, 379 U.S. 536 (1965) (civil rights protesters cheering, clapping and singing did not constitute a breach of the peace).

Ashtrays and Elevator Shafts Share Space In Clive Martin's Recording Repertoire," 9 *Music & Sound Output* 26 (Dec. 1988); Mr Herman, "Sound on Stage: Sound Reinforcement New," 13 *Mix* 118 (Jan. 1989); D. Sheirman, "Soundmixing: Is It Live, or Is It A Compact Disc: Mixing Flim & The BB's," 9 *Music and Sound Output* 28, 29-30 (Jan. 1989); G. Whelchel, "MIDI Live," 3 *Music Technology* 17 (Dec. 1988). Requiring musicians to use only a city-supplied sound system operated by a city-designated engineer is tantamount to telling a writer what words to use and a painter what colors to put on canvases. Cf. *United States v. One Book Called "Ulysses"*, 5 F.Supp. 182 (S.D.N.Y. 1933), *aff'd*, 72 F. 2d 705 (2nd Cir. 1934).

A. The SAG Impermissibly Infringes on Respondents' Right to Freedom of Expression

There is a fundamental and frightening difference between allowing the state to regulate the time, place and manner of expression and sanctioning regulations which permit, indeed mandate, the state's participation in the expression itself. The First Amendment is designed to ensure diversity and freedom of expression; its "very purpose" is to "foreclose public authority from assuming a guardianship of the public mind through regulating the press, speech and religion." *Thomas v. Collins*, 323 U.S. 516, 545 (1945).

The SAG impermissibly infringes on musicians and concert promoters' right to freedom of expression in two crucial respects. First, the SAG vests unfettered discretion over the right to freedom of expression in the hands of city officials. *City of Lakewood v. Plain Dealer Publishing Co.*, ____ U.S. ____, 108 S. Ct. 2138, 2150-2152 (1988); *Shuttlesworth v. Bir-*

mingham, 394 U.S. 147 (1969); *Saia v. New York*, 334 U.S. 558 (1948). Second, as a result of the SAG, musicians and other users of the Bandshell whose music can only be performed successfully by a sound engineer familiar with his work and on a particular sound systems, are subjected to harshly different treatment than other users of the Bandshell. *Southeastern Promotions, Ltd. v. Conrad, supra*, 420 U.S. at 557 ("Each medium of expression . . . must be assessed for First Amendment purposes by standards suited to it, for each may present its own problems.") *And see, Anderson v. Celebrezze*, 460 U.S. 780, 793 (1983); *Brown v. Socialist Workers '74 Campaign Committee*, 459 U.S. 87, 93 (1982).[9]

1. The SAG Gives City Officials Unfettered Discretion Over Freedom of Expression

The SAG places unfettered control over musicians and concert promoters right to freedom of expression because, as the Court of Appeals, recognized:

> In the highly subjective realm of music, legitimate regulation of noise levels does not justify standardization. The required use of the city's system and technician forces each performer and sponsor to filter its sound quality, tone, mix and other aesthetic factors through the city's technician and sound system.

Ct. Ap. Op. 21.

The SAG allows the city to select any equipment it desires and any technician who is "fully versed in sound bounce patterns, daily air currents, and sound skipping within the Park." The sound technician's performance is governed only to the

9 *See generally*, C.E. Baker, "Unreasoned Reasonableness: Mandatory Parade Permits and Time, Place and Manner Regulations," 78 Nw. V.L. Rev. 937, 969 (1983); K. Karst, "Equality as a Central Principle in the First Amendment," 43 U. Chi. L. Rev. 20, 36 (1975); E. Neisser, "Charging for Free Speech: User Fees and Insurance in the Marketplace of Ideas," 74 Geo. L. Rev. 257, 297 (1985); G. Stone, "Content Neutral Restrictions," 54 U. Chi. L. Rev. 46, 81-86 (1987); G. Stone, "Content Regulations and the First Amendment," 25 Wm. & Mary L. Rev. 189, 218 (1983).

extent that he or she "must also consider the Bandshell's proximity to the Sheep Meadow, the activities at Bethesda Fountain. . . ." The SAG does not further define "consider." JA 375-376.

The standards which the SAG does express are remarkable for their lack of reference to the interests of Bandshell performers. The only limits imposed on the sound equipment and sound mixers are requirements which further the city's purported interest in controlling noise in Central Park. The SAG does not even acknowledge the interests of performers and/or their audience in the quality of the music produced. Under the SAG, the City of New York is free to select sound equipment and engineers wholly lacking in the ability to convey music in a manner pleasing to either performers or their audience. *Id.*

The city, of course, vehemently asserts that New York Sound does provide "top quality" sound and that the city supplied engineer "does all he can to accommodate the sponsor's desires" on artistic issues. Pet. Br. at 15, 42. The Solicitor General goes so far as to claim that performers "enjoy complete autonomy with respect to all issues of sound mix." U.S. Brief at 11. This line of argument only underscores the unconstitutional discretion which the SAG gives to the city. Even if it were possible for one set of sound equipment and one engineer to satisfy the taste of all performers[10] there is nothing in the SAG which requires autonomy on sound mix or which gives performers any recourse if they conclude that New York Sound is not supplying their musical requirements.

Although the SAG itself provides no guarantees of musical quality or remedies for dissatisfied performers or listeners, the city's defense of the SAG rests on the unstated assumption that the city is dedicated to providing the best possible sound engineer and sound equipment. Even if "best" in an artistic context could be objectively determined, the city's argument would run

10 The proposition that a single sound system and sound mixer can please all audiences and performers is no more likely than the assertion that a single orchestra—even the New York Philharmonic—will satisfy all classical music enthusiasts.

afoul of the Constitution. In *City of Lakewood v. Plain Dealer*, 108 S.Ct. 2138 (1988), the city asserted that permits for news racks would be denied only "for reasons related to the health, safety, or welfare of Lakewood citizens. . ." This Court rejected this illusory promise. "This presumes the Mayor will act in good faith and adhere to standards absent from the statute's face. But this is the very presumption that the doctrine forbidding unbridled discretion allows." 108 S.Ct. at 2150.

The SAG gives the city too much discretion even when it comes to regulating sound volume. Although the SAG requires the mixer to "consider" activities at the Sheep Meadow and Bethesda Fountain, it does not elucidate the meaning of the term. Thus, a sound engineer might "consider" that sound bleed from songs expressing a controversial message might intrude or annoy sunbathers more than other varieties of music. Raising or lowering sound volume based on the message of the music would certainly be unconstitutional, yet the SAG permits the city sound engineer to do just that. *See, Niemotko v. Maryland*, 340 U.S. 268, 282 (1951) (Frankfurther, J. concurring) (speech may not be suppressed "merely because public officials disapprove, the speaker's views").

2. The SAG Is Not "Content Neutral" Because It Is Dependent On Subjective Aesthetic Criteria

Petitioners' advances two internally contradictory propositions to support their claim that requiring all performers to use New York Sound's equipment and engineers is constitutional. On the one hand, the city adamantly maintains that the use of state sound equipment and a state sound engineer is content-neutral. At the same time, however, the city lauds the particular excellence of its equipment and expertise of its engineers. Much of the city's brief is devoted to various self-congratulatory notes on the care with which it selected New York Sound from no less than sixteen different aspirants; the "state of the art" equipment New York Sound employs; the "extensive" out door experience of New York Sound's employees;" and the "remarkable sensitivity" displayed by the company in terms of "aesthetic balancing." In short, the city argues that its sound

regulations are "content neutral" while at the same time insisting that the content produced by New York Sound is particularly good. The sound regulations are content-neutral, according to the city, because the state-produced sound is of superior quality.[11]

The city's argument proves too much. The First Amendment does not permit and cannot tolerate state control of artistic expression merely because the state claims that is efforts will lead to "top-quality" results. *Police Department of Chicago v. Mosley*, 408 U.S. 92, 95 (1972) ("[T]he First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.") Sound equipment and sound mixing are inherently subjective phenomena.[12] To impose one system and one engineer on all musical performers at the Central Park Bandshell is no more constitutional than requiring all violinists to use a city violin, even if the city violin was a Stradivarius. There will always be some violinists who would rather use their own. Similarly, some bands will always prefer Alan Thompson to New York Sound.

Additionally, the petitioners make much of the fact that prior to the regulations, "some groups did not provide the amplifications levels required and 'crowds unhappy with the poor sound became disappointed or unruly." Pet. Br. at 9. By contrast, the city asserts that since there has been a city sound system and sound mixer, all of the users have been satisfied. Here, again, the city makes plain that the asserted constitutionality of its

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11 "With these two problems in mind, the City advised the Use Guidelines, which unlike so many other content-neutral regulations, not only did not infringe on expression, but actually assisted the communication of those groups who without the requisite mixing skills of out-of-doors production or state-of-the-art sound equipment could not provide top quality sound at the Bandshell." (Pet. Br. at 42.)

12 *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485 (1984) is a good example of the heated controversies and ultimately unresolvable questions that can arise when different persons evaluate a sound system.

regulations are rooted in the quality of the system and engineer the city has chosen to provide.

The notion that state controlled sound equals constitutional sound raises unanswerable questions. Would the city's regulations become invalid if one group complained about New York Sound system? If more than one group complained? What would be the constitutional implications if the music critic for *The New York Times* found the system inadequate? What if the critic was only from the *New York Post*? What if members of the audience become "disappointed and unruly" after listening to New York Sound? What if the city decides it can no longer afford New York Sound and hires one of the companies it previously rejected? What if the engineer for New York Sound becomes ill and his replacement is less talented or experienced? What if new "state-of-the-art" equipment is developed and New York Sound chooses not to buy it? What if Rock Against Racism prefers Alan Thompson and his equipment?

These questions point up the difficulty of grounding regulations in the asserted excellence of government sponsored expression. The Constitution cannot support a scheme where regulations are valid if the city sound system is deemed "good" and unconstitutional if it is adjudged "not so good." "Good" and "not so good" are exactly the types of judgments that must be left to the ears of performers and their audiences—not city officials.

B. Petitioners Failed to Established That the SAG Was Narrowly Tailored To Serve A Substantial Governmental Interest Or That It Leaves Open Ample Alternative Avenues For Freedom of Expression

Even assuming arguendo that this Court concludes that the SAG does not impermissibly infringe on "artistic expression", RAR still should prevail because, as the Court of Appeals correctly concluded that the SAG was not narrowly tailored to serve a substantial governmental interest and that it failed to leave open ample alternative avenues for freedom of expression.

1. The SAG Does Not Serve A Substantial Governmental Interest

Petitioners offer two justifications for the SAG's restrictions on freedom of expression. First, they claim that they are necessary to prevent "excessive noise." Second, they contend that they are justified to ensure quality amplication of musicians who perform at the Bandshell.[13] Neither of these constitute a "substantial governmental interest."

Although this Court has held that the government has a substantial governmental interest in protecting the privacy of individuals in their home, *See e.g.*, *Frisby v. Shultz*, ____ U.S. ____, 108 S. Ct. 2495, 2502 (1988); *Carey v. Brown*, 447 U.S. 455, 471 (1980); *Rowan v. Post Office Dept.*, 397 U.S. 728 (1970), it is clear that no such interest exists outside of the home. *See e.g.*, *Eronzinik v. Jacksonville*, 422 U.S. 205 (invalidating an ordinance prohibiting drive-in movie theatres from exhibiting films containing nudity where the screen is visible from a public screen); *Hess v. Louisiana*, 414 U.S. 105 (1973) (use of the word "fuck" in loud voice on public street does not violate "privacy interests"); *Cohen v. California*, 403 U.S. 15 (1971) (display of message, "Fuck the Draft," in courtroom corridor did not violate "privacy interests"). Likewise, the SAG's restrictive requirements can not be justified because of a few complaints from residents of Central Park West or Fifth Avenue. *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 508 (1969); *Terminello v. Chicago*, 337 U.S. 1 (1949).

Petitioners second justification is equally inadequate because, as this Court has often recognized, "the First Amendment mandates that we presume that speakers, not the government, know best both what they want to say and how to say it."

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13 The Court of Appeals rejected the district court's finding that the SAG was implemented to ensure "quality of sound at the Bandshell because, *inter alia*, "[n]o determination was made of the weight to be given the city's interest in quality control, nor was there a finding that this objective could not be effective by other, less restrictive means." Ct. App. Op. 13, n.

Riley v. National Federation of the Blind of North Carolina, ____ U.S. ____, 108 S. Ct. 2667, 2674 (1988). Cf., *Thomas v. Collins*, 323 U.S. 516, 545 (1945) (Jackson, J. concurring).

2. The SAG Is Not Narrowly Tailored

Furthermore, even assuming *arguendo* that the petitioners' proffered justifications for the SAG constitute a substantial governmental interest, under the circumstances presented, they are not narrowly tailored to serve such an interest. This Court has said that "a statute is narrowly tailored if it targets and eliminates no more than the exact source of the 'evil' it seeks to remedy." *Frisby v. Schultz*, *supra*, 108 S.Ct. at 2502. Petitioners' SAG fails to meet this requirement because it extends far beyond the regulations of noise and impermissibly intercedes on respondent's right to freedom of expression. *Supra* at pp. 16-18. As the Court of Appeals correctly recognized "[a]ny sound system has a volume control." Ct. App. Op. 17.

Moreover, several more reasonable alternatives than those employed by respondents are readily available. Petitioners could enforce existing laws and regulations against "excessive noise" against respondents and others, impose a decibel, limit or use of a sound control device.[14] *See e.g. Jim Crockett Promotion, Inc. v. City of Charlotte*, 706 F.2d 486, 493 (4th Cir. 1983); *Reeves v. McConn*, 631 F.2d 377, 386-387 (5th Cir. 1980); *reh'g denied*, 638 F.2d 767 (1981). *And see*, N.Y.C. Admin. Code, tit. 24, § 24-203.

3. The SAG Does Not Leave Open Ample Alternative Avenues For Freedom of Expression

Finally, by requiring all users of the Bandshell to use only a city-supplied sound system, and a city-designated engineer, petitioners are essentially saying to users of the Bandshell whose "artistic expression" is impermissibly infringed by these requirements to "take it, or leave, it." However, this Court has

14 Ironically, the Solicitor General admits that the United States Parks Department controls sound volume by methods which do not mandate use of a state sound system or sound engineer. U.S. Brief at 21.

long recognized that "one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place." *Schneider v. State*, 308 U.S. 147, 163 (1939), *quoted* with approval in *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. at 556. Thus, it is of no moment that RAR could use another site for its rally/concert.

From 1862 to 1986, the Bandshell was used for concerts and performances without any restrictions on sound systems or sound engineers, and petitioner, on the record herein, have not established a constitutionally sufficient justification for their belated intrusion on the freedom of expression by users of the Bandshell.

II.

THE COURT OF APPEALS CORRECTLY APPLIED THE PRIOR DECISIONS OF THIS COURT

Petitioners' principal complaint to this Court is that the Court of Appeals failed to follow this Court's decisions in *Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984) and *United States v. Albertini*, 472 U.S. 675 (1985). However, neither *Clark* nor *Albertini*, both of which are easily distinguishable from the case at bar, set forth a new constitutional standard. In fact, the Court of Appeals' decision is, in all respects, consistent with these cases.

A. The Standard of Review

Last term, Justice O'Connor summarized this Court's prior decisions on regulations limiting freedom of speech as follows:

> To ascertain what limits, if any, may be placed on protected speech, we have often focused on the "place" of that speech, considering the nature of the forum the speakers seek to employ. Our cases have recognized that the standards by which limitations on speech must be evaluated "differ depending on the character of the property." Specifically, we have identified three types of fora: "the

> traditional public forum, the public forum created by government designation, and the non-public forum."

Frisby v. Schultz, ____ U.S. ____, 108 S.Ct. 2495, 2499 (1988), *quoting*, respectively, *Perry Education Assn. v. Parry Local Educators Assn.*, 460 U.S. 37, 44 (1983) and *Cornelius v. NAACP Legal Defense and Educational Fund, Inc.*, 473 U.S. 788, 805 (1985).[15] In "traditional public forums," such as "streets and parks", "the government's ability to permissibly restrict expressive conduct is very limited." *United States v. Grace*, 461 U.S. 171, 177 (1983). *See also*, *Boos v. Barry*, ____ U.S. ____, 108 S. Ct. 1157, 1162 (1988). Regulations governing the use of streets and parks will survive constitutional scrutiny only if

> they are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a substantial governmental interest, and that they leave ample alternative channels for communication.

Clark v. Community for Creative Non-Violence, 468 U.S. 288, 293 (1984). See also, *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 50 (1986); *Regan v. Time, Inc.*, 468 U.S. 641, 648 (1984).

B. The Court of Appeals Decision Is Consistent With This Court's Prior Decisions

In its decision below, the Court of Appeals, defined the First Amendment's limitations on the power of local regulators as follows:

> Content neutral time, place and manner regulations are permissible so long as they are narrowly tailored to serve a

15 *See generally*, H. Kelvin, "The Concept of the Public Forum: Cox v. Louisiana," 1965 Sup. Ct. Rev. 1; Neisser, "Charging for Free Speech: User Fees and Insurance in the Marketplace of Ideas," 74 Geo. L. J. 257, 283-288 (1985) (hereinafter "Neisser"); Nimmer, *Freedom of Speech*, § 4.09 [D][1] (1984) (hereinafter "Nimmer"); Stone, "Fora Americana: Speech in Public Places," 1974 Sup. Ct. L. Rev. 233 (hereinafter "Stone"); Tribe, *American Constitutional Law*, 986-997 (2nd Ed. 1988) (hereinafter "Tribe").

> substantial governmental interest and do not unreasonably limit alternative avenues of expression.

Ct. App. Op. 11-12, *citing*, *Clark v. Community for Creative Non-Violence*, *supra*, 468 U.S. at 295; *City of Renton v. Playtime Theatres*, *supra*, 475 U.S. at 50; *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 (1976). Judge Dorsey, speaking for all the members of the court, by way of clarification, then observed, "[h]owever, the method and extent of such regulation must be reasonable, that is it must be the least intrusive upon the freedom of expression as is necessary to achieve a legitimate purpose of the regulation." *Id.* Seizing on this one sentence and the Court of Appeals consideration of the alternative to those employed in the SAG, Petitioners claim that the decision conflicts with *Clark* and *Albertini*. Nothing could be further from the truth.

First, neither *Clark* nor *Albertini* set forth a new constitutional standard. These cases rest rather on legal principles and/or factual situations inapposite to those herein. In sharp contrast to the instant case, *Albertini* involved access to a military base, government-owned property which, even when it is open to the public, has never been considered a "traditional public forum." *United States v. Albertini*, *supra*, 472 U.S. at 684. *See also*, *Greer v. Spock*, 424 U.S. 828 (1976). *Cafeteria Workers v. McElroy*, 367 U.S. 886, 893 (1961) (Commanding officers of military bases have "historically unquestioned power . . . . [to] summarily exclude civilians from the area of their command."). *See generally*, J. Hirschhorn, "The Separate Community: Military Uniqueness and Servicemen's Rights," 62 N.C.L. Rev. 177 (1984).

In *Clark*, this Court upheld the United States Park's Services prohibition on overnight sleeping in Lafayette Park and the Mall because of the "Government's substantial interest in maintaining [them] in the heart of the our capitol in attractive and intact condition, readily available to the millions of people who wish to see and enjoy them by their presence." *Clark v. Community for Creative Non-Violence*, *supra*, 468 U.S. at

296.[16] Additionally, the Park's Service's regulation did not, as is the case here, significantly impinge on CCNV's right to freedom of expression.[17]

In short, both *Clark* and *Albertini* rest on a determination that the forms of expression sought was incompatible with the historic and normal use of the properties therein. *Grayned v. City of Rockford*, 408 U.S. 104, 116 (1972). ("The crucial question is whether the manner of expression in incompatible with the normal activity of a particular place at a particular time.") *See also*, *United States v. Grace*, 460 U.S. at 186-187 (Marshall, J. concurring); *Widmar V. Vincent*, 454 U.S. 263 (1981); *Shad v. Borough of Mount Ephraim*, 452 U.S. 61 (1981); *Greer v. Spock*, *supra*, 424 U.S. at 843 (Powell, J. concurring); *Brown v. Louisiana*, 383 U.S. 131, 141-142 (1966). *See generally*, Tribe, *American Constitutional Law*, 690-691 (1st Ed. 1978). No such claim can be made here.

Secondly, this Court has repeatedly emphasized the need for precision in regulation effecting the exercise of First Amend-

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16 Central Park can hardly be compared to either Lafayette Park or the Mall. "Lafayette Park is a roughly 7-acre square located across Pennsylvania Avenue from the White House. Although originally part of the White House grounds, President Jefferson set it aside as a park for the use of residents and visitors. It is a "garden park with a . . . formal landscaping of flowers and trees, with fountains, walks and benches. . . The Mall is a stretch of land running westward from the Capitol to the Lincoln Memorial some two miles away. It includes the Washington Monument, a series of reflecting pools, trees, lawns and other greenery. It is bordered by, *inter alia*, the Smithsonian Institution and the National Gallery of Art. Both the Park and the Mall were included in Major Pierre L'Enfant's original plan for the Capital. Both are visited by vast numbers of visitors from around the country, as well as by large numbers of residents of the Washington Metropolitan area." *Clark v. Community for Creative Non-Violence*, 468 U.S. at 290.

17 The impact of the Park Service's prohibition on overnight sleeping on the Community for Creative Non-Violence's right to freedom of expression was minimal because: (1) the Parks Service allowed CCNV to erect two symbolic tent cities and (2) the "major value" of overnight sleeping was "facilitative." *Clark v. Community for Creative Non-Violence*, 468 U.S. at 292, 296.

ment rights. *See e.g.*, *Boos v. Barry*, 108 S.Ct. at 1162; *Secretary of State v. Joseph H. Munson*, 467 U.S. 947, 961 (1984); *Shad v. Borough of Mount Epharim*, *supra*, 452 U.S. at 68-71; *Village of Schaumberg v. Citizens for a Better Environment*, 444 U.S. 620, 637 (1980); *NAACP v. Buttons*, 371 U.S. 415, 438 (1963). Obviously, a regulation is neither precisely drawn nor "narrowly tailored" if less intrusive means than those employed are available. Indeed, just last term, in *Boos v. Barry*, this Court, in voiding a provision banning the display of certain signs within 500 feet of a foreign embassy, stated:

> [T]he display clause is not crafted with sufficient precision to withstand First Amendment scrutiny. It may serve an interest in protecting the dignity of foreign missions, but it is not narrowly tailored; a less restrictive alternative is readily available.

Boos v. Barry, *supra*, 108 S.Ct. at 1168. *See also*, *Federal Communication Commission v. League of Women Voters of California*, 468 U.S. 364, 395 (1984).

Thirdly, this Court, as did the Court of Appeals, has often considered whether less intrusive alternatives to those employed exist. *Riley v. National Federal of the Blind of North Carolina*, ____ U.S. ____, 108 U.S. 2667, 2679 (1988); *Heffron v. International Society for Krishna Consciousness*, 460 U.S. 640, 654 (1981); *Schaumberg v. Citizens for a Better Environment*, *supra*, 444 U.S. 635-639; *Shelton v. Tucker*, 364 U.S. 479 (1960). *And see generally*, Tribe, *supra*, 997-86; Neisser, *supra*, 283; Stone, *supra*, 264-272. Note "Less Drastic Means and the First Amendment," 78 Yale L. J. 464 (1969)

Finally, Petitioners and the Solicitor General strenuously argue that the Court of Appeals decision improperly intrudes on the deference accorded local regulatory bodies. Pet. Br. at 28, 31-32; U.S. Br. at 18-20. Time and time again this Court has rejected such arguments because, although "legislative preferences or beliefs respecting matters of public convenience may well support regulations directed at other personal activities," they are "insufficient to justify such as diminishes the exercise of rights so vital to the maintenance of democratic institu-

tions." *Schneider v. State*, 308 U.S. 147, 161 (1939). *Accord*, *Riley v. National Federation of the Blind of North Carolina*, *supra*, 108 S.Ct. at 2676. ("[W]e reaffirm simply and emphatically that the First Amendment does not permit the State to sacrifice speech for efficiency."). *Bose Corp. v. Consumers Union*, *supra*, 466 U.S. at 511 ("Judges, as expositors of the Constitution, must independently decide whether the evidence in the record is sufficient to cross the constitutional threshold.") *And see*, Neisser, *supra*, at 281. ("The first amendment is designed, interpreted and implemented to protect all forms of conmunication from government interference and control.") *See generally*, T. Emerson, *The System of Freedom of Expression* (1976).

Accordingly, this Court should reject Petitioners' argument that the Court of Appeals failed to follow *Clark* and *Albertini*.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

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**Counsel for Respondent gratefully acknowledges the assistance of Meredith Gowan, a third year student at University of Mississippi School of Law, in the research of this brief and Carol Afarioqun in the production of this brief.